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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. **PAULINO HERRERA-HERNANDEZ,** Defendant.	**Case No. 14-CR-3571-LAB** **DATE: March 24, 2015** **TIME: 9:00 a.m.** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION**

I.

INTRODUCTION

The Court should dismiss the information against Mr. Herrera-Hernandez because he has never been validly ordered removed from the United States. Mr. Herrera-Hernandez's two expedited removals, and any subsequent reinstatements, cannot be used to support a section 1326 conviction. On June 24, 2008 and February 23, 2009, Mr. Herrera-Hernandez appeared before immigration officers for expedited removal proceedings. On each occasion, Mr. Herrera-Hernandez attempted to tell the officers that he did not speak or understand Spanish and that the only language he understood was Mixteco.

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On each occasion, the officer failed to provide Mr. Herrera-Hernandez with a Mixteco interpreter. On each occasion, the officer failed to inform Mr. Herrera-Hernandez that he was in formal removal proceedings and failed to read the Record of Sworn Statement to Mr. Herrera-Hernandez. The officers told Mr. Herrera-Hernandez where to sign the forms, though he did not understand what he was signing. These actions violated Mr. Herrera-Hernandez's due process rights to receive notice of and respond to the allegations against him.

In each case, he was prejudiced by these violations. Mr. Herrera-Hernandez was statutorily eligible to withdraw his application for admission, a form of relief from removal. Additionally, he was a good candidate for this relief, as he had not engaged in deliberate or obvious fraud to gain entry into the United States, he had no prior orders of removal, and no criminal history. He had more than a plausible chance of convincing the officers to let him depart after first withdrawing his application for removal.

Because both removals were infected by due process violations resulting in prejudice, neither of these removals, nor their reinstatements, can form the predicate of an illegal re-entry prosecution. The Court should dismiss the information.

II.

STATEMENT OF FACTS

A. Mr. Herrera-Hernandez's Background

Paulino Herrera-Hernandez is 42 years old. *See* Exhibit A, Declaration of Mr. Herrera-Hernandez. He was born in Guerrero, Mexico and attended school only through the first grade. *Id*. at ¶2-3. Mr. Herrera-Hernandez's wife and seven children, between the ages of 1 and 16, live in Guerrero. *Id*. at ¶8. He is the primary source of financial support for his family. *Id*. at ¶9. Mr. Herrera-Hernandez has worked in the fields his entire life, picking corn and beans, and earns an average of $26 every 3 months. *Id*. at ¶7.

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The only language that Mr. Herrera-Hernandez speaks and understands fully is Mixteco. *Id.* at ¶4. He can speak and understand very little Spanish. *Id.* at ¶5. His limited knowledge of the Spanish language is what he learned from hearing others speak it while working in the tomato fields from 2005 to 2008. *Id.* at ¶6.

Mr. Herrera-Hernandez was coming to the United States with the hopes of finding more stable and higher paying employment to support his family. *Id.* at ¶10. At the time of his removals in 2008 and 2009, he had never been convicted of a crime. *Id.* at ¶11.

B. The June 24, 2008 Expedited Removal

On June 24, 2008, Mr. Herrera-Hernandez was apprehended for "eluding inspection" by attempting to enter the United States through the primary lane at the San Ysidro Port of Entry. He was processed at the San Ysidro Port of Entry. He was served with a Notice and Order of Expedited Removal. *See* Exhibit B. The Notice charged him with being removable for the following reasons:

1) On or about June 24, 2008, you attempted to elude inspection to enter the United States, via the San Ysidro, California Port of Entry.

2) You are a citizen and national of Mexico.

3) You have no legal right to enter, pass through, or remain in the United States.

4) You are not in possession of a valid entry document as required by the Act.

Id.

At the Port of Entry, Mr. Herrera-Hernandez primarily interacted with CBP Officer Rodrigo Lopez, who processed the immigration paperwork related to the expedited removal. *Id.* As reflected in the Record of Sworn Statement, Officer Lopez spoke to Mr. Herrera-Hernandez in Spanish.

Before: RODRIGO LOPEZ CBP OFFICER
(Name and Title)
In the SPANISH language. Interpreter RODRIGO LOPEZ Employed by CBP

See Exhibit C, 2008 Record of Sworn Statement. In the limited Spanish that he knows, Mr. Herrera-Hernandez explained to Officer Lopez that he did not understand Spanish and that he needed a Mixteco interpreter. *See* Exhibit A at ¶15.[1] Despite his request, a Mixteco interpreter was never provided. *Id.* at ¶16. Officer Lopez did not tell Mr. Herrera-Hernandez he was in formal removal proceedings. *Id.* at ¶17. He did not tell Mr. Herrera-Hernandez that he could call a lawyer. *Id.* at ¶18. At the end of the interview, Officer Lopez placed forms in front of Mr. Herrera-Hernandez and told him where to initial and sign them. *Id.* at ¶20. He did not read the forms to Mr. Herrera-Hernandez; if he did, it was not in a language that Mr. Herrera-Hernandez understood. *Id.* at ¶19. Officer Lopez did not tell Mr. Herrera-Hernandez that he had any options other than to sign the paperwork. *Id.* at ¶22. Mr. Herrera-Hernandez did not understand what he was signing. *Id.* at ¶21.

Subsequent to the execution of the paperwork, Mr. Herrera-Hernandez was ordered removed. *See* Exhibit B.

C. The February 23, 2009 Expedited Removal

On February 22, 2009, Mr. Herrera-Hernandez was arrested by a Border Patrol Agent in the hills approximately two miles east of the Stay Mesa Port of Entry and four miles north of the border. He was processed at the Chula Vista Border Patrol Station. He was served with a Notice and Order of Expedited Removal. *See* Exhibit D. The Notice charged him with being removable because he is "an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act. You are a citizen and national of Mexico, and on February 21, 2009, you illegally entered the United States at/near Stay Mesa, California, and you were not inspected by an Immigration Officer." *Id.*

At the Border Patrol station, Border Patrol Agent Rigoberto Ceja-Hand processed the immigration paperwork related to the expedited removal. *Id.* The Record of Sworn Statement does not make clear what language was used when informing Mr. Herrera-Hernandez of his rights and the removal proceeding. *See* Exhibit E. The Record of Sworn

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[1]The statement Mr. Herrera-Hernandez made, "No entiende Espanol. Yo quiero Mixteco," roughly translates to "I do not understand Spanish. I want Mixteco."

Statement does make clear that an interpreter was not used.

Before: RIGOBERTO CEJA-HUANTE BORDER PATROL AGENT
(Name and Title)
In the__________ language. Interpreter NONE USED Employed by__________

Id. Mr. Herrera-Hernandez recalls being spoken to in both English and Spanish. *See* Exhibit A at ¶26. Again, Mr. Herrera-Hernandez explained to the agent that he did not understand and requested a Mixteco interpreter, but none was provided. *Id*. at ¶27-28. Again, the agent did not tell Mr. Herrera-Hernandez that he could have an attorney. *Id*. at ¶30. The agent finished the interview and placed several sheets of paper before Mr. Herrera-Hernandez and instructed him to sign them. *Id*. at ¶32. The agent did not read the papers to Mr. Herrera-Hernandez, or if he did, it was not in a language that Mr. Herrera-Hernandez understood. *Id*. at ¶31. As a result, Mr. Herrera-Hernandez did not understand what he was signing. *Id*. at ¶33.

The agent did not inform Mr. Herrera-Hernandez of his options other than signing the paperwork. *Id*. at ¶34. Soon after this interview, Mr. Herrera-Hernandez was again ordered removed from the United States. *See* Exhibit D.

D. The May 17, 2011 Reinstatement

On May 16, 2011, Mr. Herrera-Hernandez was convicted and sentenced for violating 8 U.S.C. §1326 for being a deported alien found in the United States. He received a sentence of 5 years of probation. According to discovery materials, the February 23, 2009 expedited removal order was reinstated on May 17, 2011.

E. Subsequent Events & Procedural History

On November 15, 2014, Mr. Herrera-Hernandez was arrested in the brush about five miles east of the Stay Mesa Port of Entry and about eight miles north of the border. The government alleges that he is a citizen of Mexico with no documents authorizing his presence in the United States.

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On December 11, 2014, Mr. Herrera-Hernandez waived indictment and pleaded not guilty to a one-count information charging him with being a removed alien found in the United States in violation of 8 U.S.C. § 1326(a) and (b).

These motions follow.

III.

SUMMARY OF ARGUMENT

This case is directly controlled by a recent Ninth Circuit case, *United States v. Rayons-Vac.*, 771 F.3d 1195 (9th Cir. 2014). As in that case, Mr. Herrera-Hernandez's due process rights were violated when the officers failed to provide interpreter assistance to Mr. Herrera-Hernandez. The officers also failed to read the Record of Sworn Statement to Mr. Herrera-Hernandez and instructed him to sign it without understanding what it said. This error violated Mr. Herrera-Hernandez's due process rights to receive notice of and have the opportunity to respond to the allegations against him.

Mr. Herrera-Hernandez was prejudiced because he was statutorily eligible for the form of relief from removal known as withdrawal of application. Additionally, under *Rayons-Vac.*, a defendant need only make a showing that a grant of relief was "plausible" according to both enumerated and unenumerated factors. Because Mr. Herrera-Hernandez's candidacy for withdrawal of application was just as strong as the defendant's in *Rayons-Vac.*, he can satisfy the prejudice requirement.

IV.

ARGUMENT

A. The Requirements of a Motion to Dismiss under § 1326(d).

In order to serve as an element of a criminal offense, an order of removal must comport with Due Process. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987). A defendant in a prosecution for illegal re-entry may collaterally attack the prior order of removal, and the removal may not serve as the basis of a criminal conviction, if the defendant can show (1) that he exhausted his administrative remedies, (2) that he was

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deprived of judicial review, and (3) that his removal order was fundamentally unfair. 8 U.S.C. § 1326(d); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004).[2]

A defendant is excused from having to demonstrate exhaustion of remedies and deprivation of judicial review if he can show that his purported waiver of his right to appeal was not considered and intelligent. *See United States v. Muro-Inclan*, 249 F.3d 1180, 1183-1184 (9th Cir. 2001); *United States v. Lopez-Vasquez*, 1 F.3d 751, 753-754 (9th Cir. 1993) (en banc). An underlying removal order is "fundamentally unfair" if: "(1) [a defendant's] due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Zarate–Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998).

B. 1326(d) Motions and Expedited Removals: *United States v. Rayons-Vac.*

The analysis for a 1326(d) motion in the expedited removal context follows the same general path as with a removal after a hearing before an immigration judge: the movant must show a due process violation and prejudice. However, the Ninth Circuit has recently issued a major published opinion clarifying exactly how those two concepts apply to the unique context of an expedited removal.

1. Due process in an expedited removal

In *United States v. Rayons-Vac.*, the defendant explained that the immigration officer "neither read to him nor permitted him to review the information in the sworn statement." 771 F.3d at 1205. The Ninth Circuit concluded that this failure to permit the defendant to review the record of sworn statement was "in contravention of Rayons-Vac.'s due process rights." *Id.* The Ninth Circuit held that this due process right was one both established by regulation and protected by the Due Process Clause of the Fifth Amendment. *See id.*

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[2] Although 8 U.S.C. § 1225(b)(1)(D) purports to forbid collateral attacks of expedited removal orders, the Ninth Circuit has held this portion of the statute unconstitutional. *See United States v. Barajas-Alvarado*, 655 F3d. 1077, 1087 (9th Cir. 2011).

The regulation that governs expedited removals requires officers to read (or have the alien read) the statements on Form I-867B before signing them. *See* 8 C.F.R. § 235.3(b)(2)(I). Moreover, the regulation states that "[i]nterpretive assistance ***shall*** be used if necessary to communicate with the alien." *Id*. (emphasis added). Therefore, requiring the defendant to sign the statement without having first read it deprived him of an "opportunity to respond" as required by due process. *Id.* at 1204.

2. Plausibility of relief in an expedited removal.

After concluding that the defendant had suffered a violation of his due process rights, the Ninth Circuit turned to the issue of prejudice to determine whether Rayons-Vac. had had "plausible grounds for relief from the removal order." *Id.* at 1206 (citation and internal quotation marks omitted). In the expedited removal context, the primary form of available relief is the ability to withdraw an application for admission and to depart the United States without a removal order. *Id.; see also* 8 U.S.C. § 1225(a)(4) (permitting withdrawal of application); 8 C.F.R. § 1235.4 (implementing statute). The Ninth Circuit explained that a plausibility analysis has two steps: (1) identifying the factors relevant to the agency's exercise of discretion for the relief being sought, and (2) determining, in light of those factors, whether it was plausible that the agency official considering the defendant's case could have granted relief. *Id.* (citing *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013)).

Following its precedent, the Ninth Circuit looked to the Inspector's Field Manual to determine whether the defendant's relief was plausible. *Id*. at 1207. The Court stated:

> The Inspector's Field Manual provides for a highly individualized determination and instructs officers to "consider all facts and circumstances related to the case to determine whether permitting withdrawal would be in the best interests of justice." INS Inspector's Field Manual §17.2(a) (2007), *available at* Westlaw FIM-INSFMAN 17.2, 2007 WL 7710869; *see also Matter of Vargas-Molina*, 13 I. & N. Dec. 651, 652-53 (BIA 1971). The Manual also enumerates six factors relevant to the question of relief: "(1) the seriousness of the immigration violation; (2) previous findings of inadmissability against the alien; (3) intent on the part of the alien to violate the law; (4) ability to easily overcome the ground of inadmissability; (5) age or poor health of the alien; and (6) other humanitarian or public interest considerations." [*United States v.*] *Barajas-Alvarado*, 655 F.3d [1077,] 1090 (citing INS Inspector's Field Manual §17.2(a) (2001)). This list of

> considerations is non-exhaustive. *See* INS Inspector's Field Manual §17.2(a) (2007) (specifying that relevant factors "are not limited to" the enumerated considerations); *see also Barajas-Alvarado*, 655 F.3d at 1091 (evaluating the weight due to unenumerated factors, taking into account the Manual's failure to identify the factors specifically). Finally, the Manual identifies germane considerations, noting in particular that withdrawal should "ordinarily" not be permitted "in situations where there is obvious, deliberate fraud on the part of the applicant." *Id*. (citing as an example of obvious fraud the use of counterfeit documents).

Id. (brackets in citations added). The Court went on to emphasize that the defendant "need not prove that relief was probable." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) for plausibility standard). "Certainly, he need not show that he definitely would have received immigration relief. Instead, Rayons-Vac. need only establish 'some evidentiary basis on which relief could have been granted.'" *Id*. (quoting *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1049-50 (9th Cir. 2012) (other quotation marks and citation omitted)).

3. Plausibility of relief in *Rayons-Vac.*

Turning to "Rayons-Vac.'s unique characteristics," *id*. at 1207-08, the Court first noted that several factors cut against the defendant receiving relief. The defendant in that case had at least six prior illegal re-entries. *Id.* at 1208. He had suffered a previous finding of inadmissibility. *Id.* Neither his health nor his age helped his case. *Id*. The fact that he "had no petitions for status pending . . . and was not officially married to a United States citizen" did not help him show that he could easily overcome his inadmissibility. *Id.* In fact, five of the six factors listed in the Manual cut against plausibility in his case. *Id.*

The Court found, however, that his "significant humanitarian considerations" counseled in favor of relief. *Id.* His partner and their children, along with his mother, siblings, and other family members, all lived in the United States. *Id.* Therefore, "the humanitarian and public interest factors weigh[ed] significantly in Rayons-Vac.'s favor." *Id.* (citing *United States v. Haro-Munoz*, 552 Fed. App'x 689, 690 (9th Cir. 2014) for the proposition that there is a "compelling humanitarian interest in keeping families united").

The Court also looked to factors outside the Manual. *Id.* at 1209. It found that Rayons-Vac.'s "misdemeanor criminal history" did not "have much bearing on the plausibility of relief." *Id.* It also looked to documentary evidence he had provided that another individual with no pending petitions, a prior conviction for a false statement to a federal officer, and a prior exclusion order had been permitted to withdraw his application. *Id.* This evidence showed that "relief under such circumstances was plausible." *Id.* It also looked to statistics Rayons-Vac. had provided indicating that a large percentage of aliens in expedited removal proceedings are afforded relief. *Id.*

Concluding that Rayons-Vac. had shown "that he had some evidentiary basis for relief from his 2011 removal order," the Court reversed the district court's denial of his 1326(d) motion.

C. Mr. Herrera-Hernandez's Case.

1. Mr. Herrera-Hernandez has exhausted administrative remedies and was deprived of judicial review.

Because 8 U.S.C. § 1225(b)(1) prohibits any review of the order of removal, Mr. Herrera-Hernandez has established that he exhausted administrative remedies and that he was deprived of judicial review. *See Barajas-Alvarado*, 655 F.3d at 1082 ("…the INA precludes meaningful judicial review of the validity of the proceedings that result in an expedited removal order."); *see also Rayons-Vac.*, 771 F.3d at 1202 (same).

2. The officers' failure to provide interpretive assistance and to read Mr. Herrera-Hernandez's statements to him before he signed them were due process violations.

The due process violations in this case are much more egregious than those present in *Rayons-Vac*. Just as in *Rayons-Vac.*, the immigration officers here did not read the record of sworn statements to Mr. Herrera-Hernandez before having him sign them. *See Exhibit A* at ¶¶ 34-27; 49-52. These omissions constituted a violation of Mr. Herrera-Hernandez's due process right to respond to the allegations against him. *Rayons-Vac.,* 771 F.3d at 1205.

Moreover, the due process violation in Mr. Herrera-Hernandez's case is even more fundamental than that present in *Rayons-Vac.* because of the lack of interpretive assistance provided to Mr. Herrera-Hernandez, who only speaks Mixteco. The Ninth Circuit has held that the right to procedural due process includes the right to effective translation. *See Perez-Lastor v. INS,* 208 F.3d 773, 778 (9th Cir. 2000). In that case, the Ninth Circuit elaborated:

"It is long-settled that a competent translation is fundamental to a full and fair hearing. If an alien does not speak English, deportation proceedings *must* be translated into a language the alien understands." *Id*. at 778 (citations omitted); *see also Barajas-Alvarado,* 655 F.3d at 1088.

In *Barajas-Alvarado,* the Ninth Circuit recognized that "applicable procedures require that the immigration official provide the alien with '[i]nterpretive assistance,' §1235.3(b)(2)(I), and we have held that 'due process requires that an applicant be given competent translation services.'" *Id*. (citations omitted). In *Barajas-Alvarado,* the record was ambiguous as to whether the defendant received the required assistance because some portions of the documentation indicated that translation services were provided while others did not. *Id*.

There is no such ambiguity here. None of the documentation indicates that Mixteco interpretive services were provided to Mr. Herrera-Hernandez. The documentation, coupled with Mr. Herrera-Hernandez's declaration, establish that the proceedings took place in Spanish and English despite Mr. Herrera-Hernandez's request for a Mixteco interpreter. Under Ninth Circuit precedent, this is a clear violation of due process.

3. Mr. Herrera-Hernandez was prejudiced by these due process violations.

Prejudice to Mr. Herrera-Hernandez may be established if he had a "plausible ground" for relief from removal. *United States v. Arce-Hernandez,* 163 F.3d 559, 563 (9th Cir. 1999). He does not have to show that he "actually would have been granted relief." *Ubaldo-Figueroa,* 364 F.3d at 1050. It is sufficient that the defendant show that he "could have" been granted relief at his removal proceeding. *United States v. Ortiz-Lopez,* 385 F. 3d 1202, 1204 (9th Cir. 2004). Once the defendant makes a prima facie showing that he had a plausible ground of relief, the burden shifts to the government to "demonstrate that the procedural violation *could not have* changed the proceedings' outcome." *United States v. Gonzalez-Valerio,* 342 F.3d 1051, 1054 (9th Cir. 2003) (emphasis added). Thus, it is not enough for the government to show that it was unlikely that the defendant would

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have been granted relief, since "even a petitioner with . . . possibly a weak case has a right to a fair hearing." *Zolotukhin v. Gonzalez,* 417 F.3d 1073, 1077 (9th Cir. 2005).

(a) The prejudice *resulted from* the due process violation.

In *Rayons-Vac.*, the Ninth Circuit explained the link between the due process violation and prejudice:

> Finally, contrary to the government's argument, the prejudice Rayons-Vac. suffered ***resulted from*** the due process violation. As noted, it is uncontroverted that no immigration officer explained the nature of the removal proceedings to Rayons-Vac. or that he could be ordered removed from the United States. His sworn statement further asserts that had he known he could withdraw his application, he would have asked to do so in order to preserve his ability to reenter the United States legally by avoiding the bar resulting from a removal order.

771 F. 3d at 1210 (emphasis added). Just as in *Rayons-Vac.*, the prejudice here *resulted from* the due process violation; specifically, the lack of interpretive services and the failure to allow Mr. Herrera-Hernandez to read the Record of Sworn Statement prevented him from understanding the allegations against him and prevented him from seeking to withdraw his application. *See, e.g., Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (holding that "(b)y showing that he was denied the opportunity to be heard before the Board of Immigration Appeal (when he did not receive notice of a briefing schedule and failed to file his brief, Petitioner has shown substantial prejudice" and finding that "denial of the opportunity to be heard is, in and of itself, substantial prejudice); *see also Sewak v. INS*, 900 F.2d 667, 670 n.7 (3d Cir. 1990) (rejecting harmless error doctrine where respondent was denied his fundamental statutory right to receive notice of hearing).

(b) Mr. Herrera-Hernandez suffered prejudice because he was not informed of withdrawal of application, despite his statutory eligibility.

The statute on withdrawal of application for admission reads: "An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States." 8 U.S.C. §1225(a)(4). Although Mr. Herrera-Hernandez did not formally apply for admission into the United States, he is considered to be an applicant for admission and was statutorily eligible for withdrawal of application for admission. *See Rayons-Vac.*, 771 F.3d at 1206.

Both the Supreme Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) and the Ninth Circuit's subsequent en banc decision in *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992), establish that where defendants were statutorily eligible for relief but were not advised of this fact, they suffered prejudice. *See Mendoza-Lopez*, 481 U.S. at 842 ("[S]ince the only relief for which [the defendants] would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction"); *Pro-Tovar*, 975 F.3d at 595 (finding that the defendants in *Mendoza-Lopez* "*were* prejudiced") (emphasis in original). However, several years after *Proa-Tovar*, a Ninth Circuit panel spontaneously began to consider a defendant's years of residence, family ties, and other equitable factors to conclude whether he was, in fact, prejudiced by the underlying proceedings, with no authority or explanation for this additional inquiry. *See United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996). Soon after, two other Ninth Circuit decisions adopted the language and requirements of *Jimenez-Marmolejo*. *See United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998); *Arrieta*, 224 F.3d at 1082-83. Consequently, every published Ninth Circuit decision that has required a showing of equities to demonstrate prejudice since that time has relied on one of these three cases—even though none of the three ever explained the underlying rationale for this dramatic expansion of the prejudice prong.

The problem with *Jimenez-Marmolejo* and its progeny is that it grafted on an entirely new prejudice requirement that directly conflicts with *Mendoza-Lopez*. Like *Jimenez-Marmolejo*, the *Mendoza-Lopez* defendants were eligible for discretionary relief and had not been so advised. But *Mendoza-Lopez* did not respond to this scenario by delving into factual questions of family ties, length of residence, hardship, and employment history and comparing these to the equities of others who had been granted similar forms of relief. Rather, *Mendoza-Lopez* flatly held that "the deportation proceeding ... *may not be used to support a criminal conviction*." *Mendoza-Lopez*, 481 U.S. at 842 (emphasis added). Nor did the Supreme Court remand for a court below to conduct an inquiry into these equities—it simply upheld the circuit court's decision that the defendant had established prejudice. *Id.* And since neither *Mendoza-Lopez* nor *Proa-Tovar* have ever been overturned, the § 1326(d) prejudice standard currently employed by the Ninth Circuit (requiring an equities analysis and a showing of "plausibility") violates both Supreme Court and en banc precedent.

The error of *Jimenez-Marmolejo* and its progeny becomes even more apparent when compared to prejudice findings in immigration cases. To find that an immigrant in removal proceedings has shown prejudice, the Ninth Circuit considers whether "the outcome of the proceeding *may have been affected* by the alleged violation." *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000) (emphasis added). Recently the Ninth Circuit—without examining the immigrant's underlying equities in support of relief—found that this standard had been met where the alien's attorney failed to submit an application for statutorily-available relief. *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1133-34 (9th Cir. 2013). There is no logical reason that criminal cases under § 1326(d)(3) should be treated any differently. Because the Ninth Circuit's current § 1326(d)(3) prejudice standard cannot be reconciled with Supreme Court, en banc, or immigration case law, Mr. Herrera-Hernandez can show prejudice simply through his demonstration of *statutory eligibility* for withdrawal of application, rather than an examination of his underlying equities.

In this case, Mr. Herrera-Hernandez was statutorily eligible for withdrawal of application at his 2008 and 2009 expedited removal proceedings. However, he was never adequately advised of his eligibility and never given a meaningful opportunity to apply for it. Thus, like the defendants in *Mendoza-Lopez*, he suffered prejudice.

© Mr. Herrera-Hernandez had a plausible case for withdrawal of application under *Rayons-Vac.*

In *Rayons-Vac.*, the Ninth Circuit looked to the factors listed in the Inspector's Field Manual to determine whether the defendant had a plausible case for withdrawal of application. The Court started off by emphasizing ("first and foremost") the absence of obvious or deliberate fraud, a factor that ordinarily militates against withdrawal. *See*

Rayons-Vac., 771 F.3d at 1208. Like in *Rayons-Vac.*, Mr. Herrera-Hernandez has never engaged in fraud of any kind in his attempts to enter the United States.

Ultimately, the Ninth Circuit concluded that five of the six enumerated factors cut against the defendant's plausibility for withdrawal of application. *See Rayons-Vac.*, 771 F.3d at 1208-1209. Yet the Ninth Circuit found that a single factor, humanitarian considerations[3], in conjunction with non-enumerated factors such as criminal history and the showings as to similarly-situated defendants made his case plausible. *Id.*

It's worth looking at the two cases side-by side:

Factor	***Rayons-Vac.***	***Mr. Herrera-Hernandez***
Obvious, deliberate fraud?	No.	No.
History of illegal reentries	6	Unclear (2008); 12 (2009).
Prior finding of inadmissibility	Yes - 1.	No (2008); Yes - 1 (2009).
Intent to violate the law	Walked through the mountains	Walked through the POE (2008); walked through the mountains (2009)
Health	Good	Good
Age	Unclear	36 (2008); 36 (2009)
Pending petition for status?	No.	No.
Married to USC?	No.	No.
Family in the US?	Yes.	No.
Humanitarian interest?	Yes.	Yes.
Criminal History	Misdemeanors	None.
Suspected alien smuggler	Yes	No

[3]The humanitarian interest in *Rayons-Vac.* was the compelling desire to keep families united. 771 F.3d at 1208. Though Mr. Herrera-Hernandez does not have family present in the United States, his motive for entering – to provide economic support for his family -- is similarly compelling and related to a humanitarian and public interest. *See* Exhibit A at ¶8-10. Immigration law's recognition of employment as satisfying a humanitarian and public interest is most readily obvious in the context of employment authorization. Even aliens subject to removal may have their action deferred and apply for employment authorization "if the alien establishes an economic necessity for employment." 8 C.F.R. §274a.12(c)(14).

In Mr. Herrera-Hernandez's case, many of the factors seem to cut the same way as the factors did in *Rayons-Vac*. However, unlike the defendant in *Rayons-Vac.*, Mr. Herrera-Hernandez had ***no*** criminal history, nor was he suspected of being an alien smuggler. He can satisfy the requirements as pronounced in *Rayons-Vac.* to establish plausible relief.

4. Available cases documenting decisions by an immigration officer to grant withdrawal of an application for admission demonstrates it is plausible Mr. Herrera-Hernandez also could have been granted such permission.

Finally, the Court in *Rayons-Vac.* looked to a single case the defendant had provided where a person with no pending petitions, a prior order of exclusion, and a serious federal felony conviction for lying to a federal officer had been granted withdrawal of application. *Id.*, 771 F.3d at 1209. The Court found that this showing, while not sufficient to carry the defendant's burden, made clear that even aliens with much more negative factors than his own could plausibly be granted relief. *Id.*

In line with that showing, Mr. Herrera-Hernandez proffers the following three cases:

(a) Exhibit F.

This form, granting permission to withdraw, pertains to an individual who: had felony convictions, had been the subject of a prior order of exclusion, and had no petitions or applications for lawful status pending at the time. *See Exhibit F*. The individual had been convicted for the felony offense of false statement to a federal officer in violation of 18 U.S.C. § 1001 and sentenced to a term of imprisonment of twelve months. The individual was then granted permission to withdraw his application for admission. *See id.* As the form indicates, this individual had no petitions or applications for lawful status pending at the time. *Id.* He also had been ordered excluded from the United States only two years prior. *Id.*

(b) Exhibit G.

This form, granting permission to withdraw, pertains to an individual who: had been ordered removed in 1988; convicted of alien smuggling in 2007 and sentenced to twenty-one months in prison, and who was encountered at the MCC San Diego following his conviction. *See Exhibit G*. This person also had no petitions or applications for lawful status pending. *Id*. Nonetheless, he was also permitted to withdraw his application. *Id.*

(c) Exhibit H.

This form, granting permission to withdraw, pertains to an individual who: had previously been ordered removed in 2006; had attempted to enter the United States with documents that did not belong to him (and who was paroled into the United States for prosecution); had been convicted of illegal re-entry in 2010; was encountered at California City; and who had no petitions or pending applications. *See Exhibit H.* Nonetheless, this person was also permitted to withdraw his application for admission.

V.

CONCLUSION

Paulino Herrera-Hernandez was removed from the United States via expedited removal on two occasions, and in each of those occasions, his due process rights were violated. Each time, he explained to the immigration officer that he spoke Mixteco, and yet no interpretive assistance was provided. Each time, the officers failed to read his Record of Sworn Statement to him and told him where to sign the paperwork. Mr. Herrera-Hernandez was statutorily eligible for withdrawal of application, and could plausibly have convinced an immigration officer to let him do so had it not been for the egregious due process violations. Under the Ninth Circuit's case law, he need show no more for his removals to be invalid.

In light of the due process violations and the resulting prejudice infecting his prior removal orders, the Court should dismiss the information.[4]

Respectfully submitted,

DATED: March 12, 2015

s/ Amrutha N. Jindal
AMRUTHA N. JINDAL
Federal Defenders of San Diego, Inc.
Attorneys for Paulino Herrera-Hernandez

[4]At the Motion Hearing, the Court instructed defense counsel to include a statement explaining when she received A-file discovery from the government and why this Motion to Dismiss could not have been filed prior to the Motion Hearing. That statement is attached as Exhibit I.

INDEX TO EXHIBITS

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EXHIBIT A

AMRUTHA N. JINDAL
California Bar No. 274500
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Amrutha_Jindal@fd.org

Attorneys for Mr. Herrera-Hernandez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. **Paulino HERRERA-HERNANDEZ,** Defendant.	CASE NO.: **14CR3571-LAB** DATE: March 9, 2015 TIME: 2:00 p.m. **DECLARATION OF PAULINO HERRERA-HERNANDEZ**

DECLARATION OF PAULINO HERRERA-HERNANDEZ

I, Paulino Herrera-Hernandez, do hereby declare as follows under penalty of perjury:

Introduction

1. I am the defendant in the above-captioned case.

2. I was born on March 10, 1972 in Arroyo Prieto, which is in the state of Guerrero, Mexico.

3. I attended school in Guerrero, Mexico through the first grade. I have not attended any further schooling since then.

4. I speak Mixteco. It is the only language that I understand completely and speak fluently.

5. I understand and speak very little Spanish.

6. The little Spanish I know is what I picked up from hearing others speak it while working in the tomato fields in Mexico from 2005 to 2008.

7. I have worked in the fields in Mexico my entire life, picking corn and beans. On average, I earn 400 pesos (approximately $26) every 3 months.

8. Since 2000, I have been married to Maria Aida Camilo-Calvez, a Mexican citizen. She and our seven children, between the ages of 1 and 16, live in Guerrero, Mexico.

9. My income from working in the fields is my family's primary source of financial support.

10. My interest in coming to the United States was to find more stable and higher paying employment. My hope was to send money back to my family in Mexico to assist with living and schooling expenses.

11. At the time of my 2008 and 2009 expedited removals, I had no criminal convictions.

2008 Expedited Removal

12. On June 24, 2008, I was stopped by a Customs and Border Protection officer at the San Ysidro Port of Entry.

13. I did not show any false documents or provide false information in order to try to come into the United States at that time.

14. I was processed by a Customs and Border Protection officer at the San Ysidro Port of Entry. The officer spoke to me in Spanish.

15. In the limited Spanish that I know, I told the officer that I did not understand Spanish and that I needed a Mixteco interpreter. I said to the officer, "No entiende Espanol. Yo quiero Mixteco."

16. A Mixteco interpreter was not provided to me.

17. The officer did not explain to me that I was in formal removal proceedings and would be ordered removed from the United States. If the officer did explain anything to me, it was not in a language that I understood.

18. The officer did not offer me a chance to call an attorney before I signed the paperwork that he gave me.

19. The officer did not read the paperwork to me. If he did read the paperwork, it was not in a language that I understood. I did not have a chance to read the paperwork myself.

20. The officer told me where to sign and where to put my initials on the paperwork.

21. I did not understand what I was signing.

22. The officer did not tell me I had any option other than to sign the paperwork.

23. If I had known that I could withdraw my application to be admitted to the United States, I would have asked to do that so that I could apply to come into the United States legally.

2009 Expedited Removal

24. On February 22, 2009, I was arrested by a Border Patrol agent in the hills, approximately two miles east of the Otay Mesa Port of Entry and four miles north of the border.

25. I did not show any false documents or provide false information in order to try to come into the United States at that time.

26. I was processed at the Chula Vista Border Patrol Station, where a Border Patrol agent spoke to me in a combination of Spanish and English.

27. In the limited Spanish that I know, I told the officer that I did not understand Spanish and that I needed a Mixteco interpreter. I said to the officer, "No entiende Espanol. Yo quiero Mixteco."

28. A Mixteco interpreter was not provided to me.

29. The agent did not explain to me that I was in formal removal proceedings and would be ordered removed from the United States. If the agent did explain anything to me, it was not in a language that I understood.

30. The agent did not offer me a chance to call an attorney before I signed the paperwork that he gave me.

31. The agent did not read the paperwork to me. If he did read the paperwork, it was not in a language that I understood. I did not have a chance to read the paperwork myself.

32. The agent told me where to sign and where to put my initials on the paperwork.

33. I did not understand what I was signing.

34. The agent did not tell me I had any option other than to sign the paperwork.

35. If I had known that I could withdraw my application to be admitted to the United States, I would have asked to do that so that I could apply to come into the United States legally.

Dated: February 19, 2015

PAULINO HERRERA-HERNANDEZ

EXHIBIT B

U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event Number : [redacted]

File No: A089 851 632

Date: June 24, 2008

In the Matter of: PAULINO HERRERA HERNANDEZ

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☐ (6)(C)(ii); ☒ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

1) On or about June 24, 2008, you attempted to elude inspection to enter the United States, via the San Ysidro, California Port of Entry.
1) You are a citizen and national of Mexico.
2) You have no legal right to enter, pass through, or remain in the United States.
3) You are not in possession of a valid entry document as required by the Act.

RODRIGO LOPEZ
CBP OFFICER
Name and title of immigration officer (Print)

[signature]
Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

SCOTT NEBEKER
SUPERVISORY CBP OFFICER
Name and title of immigration officer (Print)

[signature]
Signature of immigration officer

L. DELOATCH
CBP BRANCH CHIEF
Name and title of supervisor (Print)

Lee DeLoatch
Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on 6/24/08 (Date)

[signature]
Signature of immigration officer

Form I-860 (Rev. 08/01/07)

EXHIBIT C

U.S. Department of Justice
Immigration and Naturalization Service

Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Office: SAN YSIDRO, CA, POE File No: A089 851 632

Statement by: PAULINO HERRERA HERNANDEZ

In the case of: PAULINO HERRERA HERNANDEZ

Date of Birth: March 10, 1972 Gender (circle one) (Male) Female

At: SAN YSIDRO, CA, POE Date: June 24, 2008

Before: RODRIGO LOPEZ CBP OFFICER
(Name and Title)

In the SPANISH language. Interpreter RODRIGO LOPEZ Employed by CBP

I am an officer of the United States Immigration and Naturalization Service. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Immigration and Naturalization Service.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

Q. Do you understand what I've said to you?
A. Yes.

Q. Do you have any questions?
A. No.

Q. Are you willing to answer my questions at this time?
A. Yes.

Q. Do you swear or affirm that all statements you are about to make are true and complete?
A. Yes

Q. What is your true and correct name?
A: Paulino Herrera Hernandez

Q. What is your date of birth?
A. I was born on 03/10/1972

...(CONTINUED ON I-831)

I-867A (4-1-97)

x P H

U.S. Department of Justice
Immigration and Naturalization Service

Continuation Page for Form I-867A

Alien's Name	File Number	Date
PAULINO HERRERA HERNANDEZ	A089 851 632	June 24, 2008

Q In what City, State and Country were you born?
A: I was born in Tehlapa, Guerrero, Mexico.

Q. Of what country are you a citizen?
A: Mexico.

Q. Of what country is your mother a citizen?
A: Mexico.

Q. Of what country is your father a citizen?
A: Mexico.

Q. On what day did you attempt to come enter the United States?
A: Today.

Q. How did you attempt to enter the United States?
A: I was walking

Q: Did you present a document?
A: No, I tried to just walk in.

Q: Do you have or have you ever had any other legal documents to enter the United States?
A: No

Q: Do you have any applications or petitions pending with the Immigration and Naturalization Service now?
A: No.

Q: What was your purpose in coming to the US?
A: I was coming to look for work.

Q. Where was your destination in the United States?
A. To Santa Maria, CA.

Q: Have you ever lived in the United States?
A: Yes, in Arizona and in California for about 2 months.

Q. Have you ever been removed or deported from the United States previously?
A. No.

Signature	Title
RODRIGO LOPEZ	CBP OFFICER

2 of 3 Pages

X P H

Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Q: Why did you leave your home country or country of last residence?

A. No.

Q. Do you have any fear or concern about being returned to your home country or being removed from the United States?

A. No.

Q. Would you be harmed if you are returned to your home country or country of last residence?

A. No.

Q. Do you have any question or is there anything else you would like to add?

A. No.

I have read (or have had read to me) this statement, consisting of 3 pages (including this page). I state that my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the corrections noted on page(s)__________).

X [signature]

Signature: PAULINO HERRERA HERNANDEZ

Sworn and subscribed to before me at SAN YSIDRO, CA, POE on June 24, 2008.

[signature]

RODRIGO LOPEZ
CBP OFFICER
Officer, United States Immigration and Naturalization Service

Witnessed by: CBPO/T.LOPEZ [signature]

EXHIBIT D

U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event No: [redacted]

File No: A089 851 632

Date: February 23, 2009

In the Matter of: PAULINO HERRERA-HERNANDEZ

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☐ (6)(C)(ii); ☒ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

1. You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act. You are a citizen and National Of Mexico, and on February 21, 2009 you illegaly entered the United States at/near Otay Mesa, Califonia, and you were not inspected by an Immigration Officer.

RIGOBERTO CEJA-HUANTE

BORDER PATROL AGENT

Name and title of immigration officer (Print)

Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

RIGOBERTO CEJA-HUANTE

BORDER PATROL AGENT

Name and title of immigration officer (Print)

Signature of immigration officer

RYAN YAMASAKI

ACTING PATROL AGENT IN CHARGE

Name and title of supervisor (Print)

Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on 2/23/09

(Date)

Signature of immigration officer

Form I-860 (Rev. 08/01/07)

EXHIBIT E

U.S. Department of Homeland Security

Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Office: CHULA VISTA, CA, BORDER PATROL STATION File No: A089 851 632
Event No: [redacted]

Statement by: PAULINO HERRERA-HERNANDEZ

In the case of: PAULINO HERRERA-HERNANDEZ

Date of Birth: 03/10/1972 Gender (circle one): (Male) Female

At: CHULA VISTA, CA, BORDER PATROL STATION Date: February 23, 2009

Before: RIGOBERTO CEJA-HUANTE BORDER PATROL AGENT
(Name and Title)

In the ____________ language. Interpreter NONE USED Employed by ____________

I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Department of Homeland Security.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

Q. Do you understand what I have said to you?
A. Yes.
Q. Do you have any questions?
A. No.
Q. Are you willing to answer my questions at this time?
A. Yes.
Q. Do you swear or affirm that all statements you are about to make are true and complete?
A. Yes.
Q. What is your true and complete name?
A. Paulino HERRERA Hernandez.
Q. Have you ever used any other names?
A. No.
Q. What is your date of birth?
...(CONTINUED ON I-831)

U.S. Department of Homeland Security

Continuation Page for Form I867A

Alien's Name	File Number	Date
PAULINO HERRERA-HERNANDEZ	A089 851 632 Event No:[redacted]	February 23, 2009

A. 03/10/1972
Q. Where were you born?
A. Guerrero, Mexico.
Q. What country are you a citizen of?
A. Mexico.
Q. Are you in possession of any immigration documents that allow you to enter or remain in the United States legally?
A. No.
Q. Have you ever applied for any immigration status?
A. Yes.
Q. What country are your parents citizens of?
A. Mexico.
Q. Where do your parents reside?
A. Guerrero, Mexico.
Q. Do you have any family residing in the United States?
A. No.
Q. Do you have any petitions filed on your behalf?
A. No.
Q. For what purpose did you enter the United States illegally?
A. To work.
Q. What was your intended destination in the United States?
A. Rancho Del Mar, California.
Q. When and where did you last enter the United States illegally?
A. Today from Tijuana, Mexico.
Q. Were you inspected by immigration officers at a Port of Entry?
A. No.
Q. Have you ever been apprehended by any law enforcement offices in the United States or your country of citizenship?
A. Yes.
Q. How many times have you been apprehended by the United States Border Patrol for entering the United States illegally?
A. About 12 times.
Q. What happened after the United States Border Patrol apprehended you?
A. They sent me back to Mexico.
Q. Have you ever been presented before an Immigration Judge?
A. No.
Q. Were you advised of you consulate rights?
A. Yes.
Q. Are you going to speak to a consulate officer?
A. No.

Signature	Title
RIGOBERTO CEJA-HUANTE	BORDER PATROL AGENT

Form I-831 Continuation Page (Rev. 08/01/07)

U.S. Department of Homeland Security

Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Q: Why did you leave your home country or country of last residence?

A. TO WORK.

Q: Do you have any fear or concern about being returned to your home country or being removed from the United States?

A. NO.

Q. Would you be harmed if you are returned to your home country or country of last residence?

A. NO.

Q. Do you have any question or is there anything else you would like to add?

A. AT WHAT TIME WILL YOU RETURN ME TO MEXICO?

I have read (or have had read to me) this statement, consisting of 1 pages (including this page). I state that my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above named officer of the Department of Homeland Security. I have initialed each page of this statement (and the corrections noted on page(s)____________).

Signature: PAULINO HERRERA-HERNANDEZ

Sworn and subscribed to before me at CHULA VISTA, CA, BORDER PATROL STATION on February 23, 2009.

RIGOBERTO CEJA-HUANTE
BORDER PATROL AGENT
Signature of Immigration Officer

Witnessed by:____________________

EXHIBIT F

[redacted] [redacted]

U.S. Department of Homeland Security

Withdrawal of Application for Admission/Consular Notification

Basis for Action *(check all that apply)*

File No. [redacted]

Date: 06/26/2009

- ☐ Application for Admission Withdrawn
- ☐ Visa/BCC Canceled
- ☐ VWPP Refusal
- ☐ Ordered removed (inadmissible) by Immigration Judge -Section 235(b)(2)(order attached)
- ☐ Ordered removed (inadmissible) by DHS - Section 235(b)(1)(order attached)
- ☐ Waiver revoked (212)(d)(3) (order attached)
- ☐ Departure required (8 CFR 240.25) (Form I-213 attached)

Notice to: American Consul *(Location)*

From: BAKERSFIELD, CA US 93301 *(Location)*

Name (FAMILY, Given, Middle)		
[redacted]		
Citizenship: MEXICO	Country of birth: MEXICO	Date of birth: [redacted]
Complete foreign address (Mailing Address		
Complete U.S. address		
Airline/Vessel of arrival: Paroled in for prosecution	Port of arrival: SAN YSIDRO, CA	Date of arrival
Visa number, type	Date, place of visa issuance	Social Security Number

Reasons (Include all pertinent facts concerning denial of application for admission, including use of altered, counterfeit or fraudulent documents):

FBI#: [redacted] [redacted] ERD: 08/31/2009

[redacted] came to the attention of Immigration and Customs Enforcement pursuant to his incarceration with the California City Correctional Center.

Subject is a native and citizen of Mexico who has been ordered excluded from the United States on October 16, 2007 at San Ysidro, California. Subject was removed from the United States on October 16, 2007 at San Ysidro, California.

Subject was paroled into the United States for prosecution on September 1, 2008 at San Ysidro, California by an Immigration Officer.

On December 8, 2008, Subject was convicted in the United States District Court, Southern District of California, for the offense of FALSE STATEMENT TO A FEDERAL OFFICER, in violation of Title 18, United States Code, Section 1001. For that offense, Subject was sentenced to a term of imprisonment of twelve (12) months.

Subject has no petitions or applications pending, according to record checks. Subject does not have fear of torture or persecution upon being returned to Mexico. Record checks showed that the subject has not filed an appeal of his criminal conviction.

Subject will be processed as a Withdrawal of Application.

Continue on reverse or attach separate sheet as needed.

TROY MILLER

Name and Title of Officer (Print) Signature of Officer

Please Return Executed I-20[illegible]
ICE DRO
800 Truxtun Ave.
Bakersfield, CA 93[illegible]

Form I-275 (Rev. 08/01/07)

TO BE COMPLETED BY ALIEN WHEN APPLICATION FOR ADMISSION WITHDRAWN

I understand that my admissibility is questioned for the above reasons., which I have read or which have been read to me in the SPANISH language. I request that I be permitted to withdraw my application for admission and return abroad. I understand that my voluntary withdrawal of my application for admission is in lieu of a formal determination concerning my admissibility:

☒ by an immigration officer ☐ in removal proceedings before an immigration judge

8-31-07
Date

Signature of alien

INSTRUCTIONS

For withdrawal procedures, see Inspections Field Manual Chapters 17.2 and 17.15. Aliens who appear inadmissible pursuant to section 235(b)(2) of the INA who elect to withdraw application for admission may choose at any time to appear before an immigration judge for a hearing in removal proceedings. Aliens who appear inadmissible pursuant to section 235(b)(1) or inadmissible pursuant to 8 CFR 217.4 are not entitled to a hearing before an immigration judge.

If a visa is canceled pursuant to 22 CFR 41.112 or a consular-issued Border Crossing Card is voided under authority of 22 CFR 41.32 or 8 CFR 212.6., forward original of I-275 to consular post which issued the canceled or voided document.

ATTACH:
- Any lifted document
- Relating form I-213 or I-862 (Notice to Appear)
- Relating removal or waiver revocation order
- Any relating memorandum report or sworn statement

DENIED
[redacted]
DATE: 8-31-07
OFFICER ID: B1135

Please Return Executed I-205/94 to
ICE DRO
800 Truxtun Ave.
Bakersfield, CA 93301
FEDEX Account# 221009053

[redacted]

Form I-275 (Rev. 08/01/07)

EXHIBIT G

Subject ID : [redacted]9[redacted] Event No: B[redacted]

U.S. Department of Homeland Security

Withdrawal of Application for Admission/Consular Notification

Basis for Action *(check all that apply)* File No. [redacted]

Date: 05/18/2009

- ☐ Application for Admission Withdrawn
- ☐ Visa/BCC Canceled
- ☐ VWPP Refusal
- ☐ Ordered removed (inadmissible) by Immigration Judge -Section 235(b)(2)(order attached)
- ☐ Ordered removed (inadmissible) by DHS - Section 235(b)(1)(order attached)
- ☐ Waiver revoked (212)(d)(3) (order attached)
- ☐ Departure required (8 CFR 240.25) (Form I-213 attached)

Notice to: American Consul *(Location)* From: BAKERSFIELD, CA US 93301 *(Location)*

Name (FAMILY, Given, Middle) [redacted]		
Citizenship MEXICO	Country of birth MEXICO	Date of birth [redacted]8
Complete foreign address (Mailing Address		
Complete U.S. address IN ICE CUSTODY BAKERSFIELD CALIFORNIA		
Airline/Vessel of arrival PAROLED	Port of arrival SAN YSIDRO, CA	Date of arrival
Visa number, type	Date, place of visa issuance ,	Social Security Number

Reasons (Include all pertinent facts concerning denial of application for admission, including use of altered, counterfeit or fraudulent documents):

F[redacted]r came to the attention of Immigration and Customs Enforcement pursuant to his incarceration with the California City Correctional Center.

Subject is a native and citizen of Mexico who has been ordered deported from the United States on May 23, 1988 at Salem, Oregon by an Immigration Judge. Subject was removed from the United States on July 12, 1990 at El Paso, Texas.

Subject re-entered the United States on or about July 13, 1990 at an unknown location without being inspected and admitted or paroled in by an Immigration Officer.

On Ocotber 29,2007, Subject was convicted in the United States District Court, Southern District of California, for the offense of INDUCING AND ENCOURAGING ILLEGAL ALIENS TO ENTER THE UNITED STATES AND AIDING AND ABETTING, in violation of Title 8, United States Code, Section 1324(a)(1)(A)(iv) and (v)(II). For that offense, Subject was sentenced to a term of imprisonment of twenty-one (21) months.

Subject has no petitions or applications pending, according to record checks. Subject does not have fear of torture or persecution upon being returned to Mexico. Record checks showed that the subject has not filed an appeal of his criminal conviction.

Subject will be processed as a Withdrawal of Application.

Continue on reverse or attach separate sheet as needed.

A. MARTINEZ IEA [redacted]

Name and Title of Officer (Print) Signature of Officer

[redacted]ease Return Executed ~~I-205/94 to~~ [redacted]

ICE DRO

800 Truxtun Ave.

Bakersfield, CA 93301

FEDEX Account# 221009053

Form I-275 (Rev. 08/01/07)

000131

TO BE COMPLETED BY ALIEN WHEN APPLICATION FOR ADMISSION WITHDRAWN

I understand that my admissibility is questioned for the above reasons., which I have read or which have been read to me in the SPANISH language. I request that I be permitted to withdraw my application for admission and return abroad. I understand that my voluntary withdrawal of my application for admission is in lieu of a formal determination concerning my admissibility:

☑ by an immigration officer ☐ in removal proceedings before an immigration judge

7-29-09
Date

x [redacted]

Rt index -(a)

INSTRUCTIONS

For withdrawal procedures, see Inspections Field Manual Chapters 17.2 and 17.15. Aliens who appear inadmissible pursuant to section 235(b)(2) of the INA who elect to withdraw application for admission may choose at any time to appear before an immigration judge for a hearing in removal proceedings. Aliens who appear inadmissible pursuant to section 235(b)(1) or inadmissible pursuant to 8 CFR 217.4 are not entitled to a hearing before an immigration judge.

If a visa is canceled pursuant to 22 CFR 41.112 or a consular-issued Border Crossing Card is voided under authority of 22 CFR 41.32 or 8 CFR 212.6., forward original of I-275 to consular post which issued the canceled or voided document.

ATTACH:
- Any lifted document
- Relating form I-213 or I-862 (Notice to Appear)
- Relating removal or waiver revocation order
- Any relating memorandum report or sworn statement

[redacted]

IDENTED
#
DATE:
OFFICER ID:

Form I-275 (Rev. 08/01/07)

EXHIBIT H

Subject ID : [redacted] Event No: [redacted]

U.S. Department of Homeland Security

Withdrawal of Application for Admission/Consular Notification

Basis for Action *(check all that apply)*

File No. [redacted]

Date: 07/26/2011

- ☐ Application for Admission Withdrawn
- ☐ Visa/BCC Canceled
- ☐ VWPP Refusal
- ☐ Ordered removed (inadmissible) by Immigration Judge -Section 235(b)(2)(order attached)
- ☐ Ordered removed (inadmissible) by DHS - Section 235(b)(1)(order attached)
- ☐ Waiver revoked (212)(d)(3) (order attached)
- ☐ Departure required (8 CFR 240.25) (Form I-213 attached)

Notice to: American Consul *(Location)*

From: BAKERSFIELD, CA US 93301 *(Location)*

Name (FAMILY, Given, Middle) [redacted]		
Citizenship MEXICO	Country of birth MEXICO	Date of birth [redacted]
Complete foreign address (Mailing Address		
Complete U.S. address IN ICE CUSTODY 800 TRUXTUN AVENUE BAKERSFIELD KERN CALIFORNIA 93301		
Airline/Vessel of arrival	Port of arrival CALEXICO, CA	Date of arrival
Visa number, type	Date, place of visa issuance	Social Security Number [redacted]

Reasons (Include all pertinent facts concerning denial of application for admission, including use of altered, counterfeit or fraudulent documents):

BOP: 2[redacted] ERD: 07/27/2011

[redacted]s, came to the attention of Immigration and Customs Enforcement pursuant to his incarceration at California City Federal Corrections Center in California City, CA.

Subject is a native and citizen of Mexico, who applied for entry into the United Stated on October 19, 2010 through Calexico, California Port of Entry. Subject presented as his own, a California Birth Certificate, social security card, and a non-government California Identification card that was not lawfully issued to the defendant.

On October 19, 2010 Subject was paroled into the United States for prosecution.

Subject was convicted in the United States District Court at Southern District of California for the offense of ATTEMPTED ILLEGAL RE-ENTRY OF A DEPORTED ALIEN in violation of Title 8 USC Section 1326(a)and (b).

Subject was previously ordered removed from the United States on May 16, 2006 at El Centro, CA. Subject was last removed from the United States on October 18, 2010 at San Ysidro, CA.

Subject has no petitions or applications pending before DHS.

A-file was not available. T-file will be created.

...(CONTINUED ON I-831)

Continue on reverse or attach separate sheet as needed.

[redacted] Name and Title of Officer (Print)

[redacted] Signature of Officer

Form I-275 (Rev. 08/01/07)

TO BE COMPLETED BY ALIEN WHEN APPLICATION FOR ADMISSION WITHDRAWN

I understand that my admissibility is questioned for the above reasons., which I have read or which have been read to me in the ENGLISH language. I request that I be permitted to withdraw my application for admission and return abroad. I understand that my voluntary withdrawal of my application for admission is in lieu of a formal determination concerning my admissibility:

[X] by an immigration officer [ ] in removal proceedings before an immigration judge

7/27/2011
Date

X [redacted]

INSTRUCTIONS

For withdrawal procedures, see Inspections Field Manual Chapters 17.2 and 17.15. Aliens who appear inadmissible pursuant to section 235(b)(2) of the INA who elect to withdraw application for admission may choose at any time to appear before an immigration judge for a hearing in removal proceedings. Aliens who appear inadmissible pursuant to section 235(b)(1) or inadmissible pursuant to 8 CFR 217.4 are not entitled to a hearing before an immigration judge.

If a visa is canceled pursuant to 22 CFR 41.112 or a consular-issued Border Crossing Card is voided under authority of 22 CFR 41.32 or 8 CFR 212.6., forward original of I-275 to consular post which issued the canceled or voided document.

ATTACH:
- Any lifted document
- Relating form I-213 or I-862 (Notice to Appear)
- Relating removal or waiver revocation order
- Any relating memorandum report or sworn statement

[redacted]

IDENTED
[redacted]
DATE: 07-27-2011
OFFICER ID: [redacted]

Please Return Executed I-205/94 to
ICE DRO
800 Truxtun Ave
Bakersfield, CA 93301
FEDEX Account# [redacted]

Form I-275 (Rev. 08/01/07)

000081

Alien's Name	File Number	Date
[redacted]	[redacted]	July 26, 2011

Subject will withdrawal his attempted entry and voluntarily return to Mexico.

Signature	Title

EXHIBIT I

AMRUTHA N. JINDAL
California Bar No. 274500
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Amrutha_Jindal@fd.org

Attorneys for Mr. Herrera-Hernandez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. **Paulino HERRERA-HERNANDEZ**, Defendant.	CASE NO.: **14CR3571-LAB** DATE: March 9, 2015 TIME: 2:00 p.m. **DECLARATION OF AMRUTHA N. JINDAL**

DECLARATION OF AMRUTHA N. JINDAL

I, Amrutha N. Jindal, do hereby declare as follows:

1. I was appointed to represent Paulino Herrera-Hernandez in the above-captioned case on November 17, 2014.

2. On November 18, 2014, I sent a letter to Assistant United States Attorney Julia Cline requesting an opportunity to inspect and copy the entire contents of the A-File at a time mutually convenient to both parties.

3. Ten days later, on November 28, 2014, a fast-track plea offer and pages 1-58 of discovery were sent to my office. This set of discovery included incomplete A-file documents related to the 2008 expedited removal and a 2011 reinstatement.

4. On December 1, 2014, 7 pages of A-file discovery were produced, all of which

were repetitive of those received in the November 28, 2014 discovery set.

5. On December 10, 2014, defense counsel and the Assistant United States Attorney corresponded about the missing discovery.

6. On January 14, 2015, defense counsel followed up specifically on the incomplete A-file discovery.

7. On January 15, 2015, defense counsel filed a Motion to Compel Discovery, which included a request for inspection and copying of the A-file. *See* Dkt. 14.

8. On January 16, 2015, the government produced additional A-file discovery, but the additional discovery did not contain the 2009 expedited removal documents.

9. On January 22, 2015, the government produced 52 pages of A-file discovery, which included documents related to the 2009 expedited removal.

10. As part of the standard fast-track offer, the government does not permit viewing or inspection of the A-file. An A-file viewing is scheduled only when a case is "out of" fast-track and typically when it's assigned to an Assistant United States Attorney who is not in the Grand Jury unit.

11. On January 22, 2015, Assistant United States attorney Benjamin Katz entered his Notice of Appearance on this case. Defense counsel contacted Mr. Katz on January 23, 2015 to schedule an A-file viewing. The earliest mutually agreeable date to have the A-file viewing was on January 29, 2015.

12. Defense counsel viewed the A-file at the United States Attorney's Office on January 29, 2015, the same date as the Motion Hearing. As explained at the Motion Hearing, this was the first time defense counsel had the opportunity to inspect the A-file.

13. On January 30, 2015, the remaining A-file discovery requested from the A-file viewing was produced.

14. Once having all of the necessary A-file documents, time was needed to research and draft the motion to dismiss. Additionally, because Mr. Herrera-Hernandez is a Mixteco speaker, additional coordination of outside interpretive services was required to prepare his Declaration.

Dated: February 23, 2015

AMRUTHA N. JINDAL

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her information and belief, and that a copy of the foregoing document has been served this day upon:

Assistant U.S. Attorney Benjamin Katz via ECF/NEF

Respectfully submitted,

DATED: March 12, 2015

s/ Amrutha N. Jindal
AMRUTHA N. JINDAL
Federal Defenders of San Diego, Inc.
Attorneys for Paulino Herrera-Hernandez